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No. 95 736

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

RICKIE L. ROLLER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

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November 1995

QUESTION PRESENTED

Does that part of 18 U.S.C. § 793(f) which prohibits a classified material custodian from, through gross negligence, "permitting" removal of such material from its proper place require removal by a person other than the custodian?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

RICKIE L. ROLLER, Sergeant
United States Marine Corps,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

The Petitioner, Rickie R. Roller, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Armed Forces[1] rendered in this proceeding on August 23, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces, *United States v. Roller*, 42 M.J. 264 (1995), is reprinted as Appendix A.

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[1] Prior to October 5, 1994, the United States Court of Appeals for the Armed Forces was known as the United States Court of Military Appeals. The name of the court at the time of any decision cited is used in this petition.

The opinion of the United States Navy-Marine Corps Court of Military Review,[2] *United States v. Roller*, 37 M.J. 1093 (N.M.C.M.R. 1993), is reprinted as Appendix B.

JURISDICTION

The United States Court of Appeals for the Armed Forces affirmed the decision of the United States Navy-Marine Corps Court of Military Review on August 23, 1995. Title 28 U.S.C. § 1259(3) provides jurisdiction in this case and entitles Petitioner to seek review of the United States Court of Appeals for the Armed Forces' decision.

STATUTORY PROVISION INVOLVED

Paragraph (f) of 18 U.S.C. § 793 of the Federal Espionage Act provides:

> Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of his trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of

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[2] The United States Navy-Marine Corps Court of Military Review has been renamed the United States Navy-Marine Corps Court of Criminal Appeals. All decisions of this court relevant to this petition were decided before the name change, so the original name of this court is used in this petition.

such loss, theft, abstraction, or destruction to his superior officer--Shall be fined under this title or imprisoned not more than ten years, or both.

STATEMENT OF THE CASE

Petitioner, an active duty Marine, was charged, *inter alia*, with violating 18 U.S.C. § 793(f). It was alleged that Petitioner, having been entrusted with possession of classified documents and material relative to national security, did, by gross negligence, remove that material from its proper place of custody and allow it to be lost or delivered to another in violation of his trust. The U.S. Code violation was charged as a crime and offense not capital, a violation of clause 3 of Article 134, Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. § 934.

Petitioner was responsible for classified material in the Intelligence Division at Headquarters, Marine Corps, Washington, D.C., and it was not unusual for him to keep such material in his desk. When cleaning out his desk because of an impending transfer, he inadvertently packed some classified documents along with the personal effects in his gym bag. When he discovered his error several weeks later, he was afraid he would be punished, so he placed the documents in a drawer in his garage, intending to destroy them when he arrived at his next duty station. However, before he could destroy the material, it was discovered by a moving company employee who was unpacking the property after Petitioner's move. The employee contacted a bailbondsman to whom he owed money to inquire about the disposal of the material, and he was advised to notify the authorities, who recovered these and additional classified documents after a search of Petitioner's home.

In accordance with his pleas, Petitioner was found guilty of violating a lawful general order and violating 18 U.S.C. § 793(f). The remaining offenses, to which Petitioner had pleaded not guilty, were withdrawn. Petitioner was sentenced to confinement for three years, forfeiture of $400.00 pay per month for thirty-six months, reduction to the lowest enlisted pay grade, and discharge from the Marine Corps with a dishonorable

discharge. The sentence was approved by the convening authority; however, he suspended the execution of confinement in excess of ten months for a period of one year from the date of trial.

The United States Navy-Marine Corps Court of Military Review, sitting *en banc*, affirmed the findings and sentence. *United States v. Roller*, 37 M.J. 1093 (N.M.C.M.R. 1993). In its opinion, the court held, *inter alia*, that a third party did not have to be involved for prosecution under 18 U.S.C. § 793(f) for permitting classified materials to be removed from their proper place. This opinion overruled *United States v. Chattin*, 33 M.J. 802 (N.M.C.M.R. 1991), where the same court held that prosecution, under 18 U.S.C. § 793(f), for permitting, through gross negligence, the removal of classified materials required the removal be performed by a third party.

On appeal, pursuant to Article 67(a)(3), U.C.M.J., 10 U.S.C. § 867(a)(3), the United States Court of Appeals for the Armed Forces affirmed Petitioner's conviction and sentence. *United States v. Roller*, 42 M.J. 264 (1995). The court held that the statute prescribing punishment for one who permits classified information to be removed from its proper place of custody does not require the involvement of a third party.

REASON FOR GRANTING THE PETITION

Petitioner was convicted, pursuant to his pleas, of violating 18 U.S.C. § 793(f)(1) on the theory that, through gross negligence, he permitted himself to remove classified material from its authorized place. At the Navy-Marine Corps Court of Military Review he argued that his guilty plea to the above offense was improvident because 18 U.S.C. § 793(f)(1)'s removal proscription was violated only where the materials were removed by a person other than the lawful custodian.

The question of the necessity that the gross negligence result in removal of classified material by a third party has only been addressed by military courts. It was initially addressed by the Navy-Marine Corps Court of Military Review in *United States v. Chattin*, 33 M.J. 802 (N.M.C.M.R. 1991), *aff'd on other grounds*, 36 M.J. 374 (C.M.A.1992)(summary disposition). The court in

Chattin held that a third party was required to remove the classified material under 18 U.S.C. § 793(f)(1). The court relied on a holding of the United States Court of Military Appeals that, when an enactment contains an ambiguous term which reference to the enactment's legislative history does not clarify, then a court should "presume the ordinary definition suffices." *United States v. Gonzalez*, 16 M.J. 428, 429 (C.M.A. 1983). The Navy-Marine Corps Court first noted that the use of the word "permits" -- relative to the custodian's role in allowing removal of classified material from its proper place -- created an ambiguity as to whether the statute addressed the grossly negligent custodian who *personally* removes the material or only the custodian whose gross negligence *permits another person* to remove the material.

Noting the need for broad interpretation,[3] the court nonetheless held that:

> the conduct prohibited by 18 U.S.C. § 793(f)(1) presupposes compromise of the classified material through gross negligence by one who has authorized possession of, or has been entrusted with, the material *permitting* it to be removed from its proper place of custody by a third party.

Chattin, 33 M.J. at 805 (footnote omitted).

The court reached this conclusion by turning -- as the Court of Military Appeals did in *Gonzalez* -- to the definition provided the ambiguous term by BLACK'S LAW DICTIONARY. Noting that "permit" means "'[t]o suffer, allow, consent, let; to give leave or license; to acquiesce by failing to prevent, or to expressly assent to the doing of an act,'" *id.* at 804, the court held that:

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[3]The court cited a footnote from a Court of Military Review's opinion in *United States v. Gonzalez*, 12 M.J. 747 (A.F.C.M.R. 1981) for the proposition that "the statutory language of section 793(f)(1) should be given broad interpretation." *Chattin*, 33 M.J. at 804. This Court, however, has adopted the competing principle of the rule of lenity in interpreting criminal statutes. *Busic v. United States*, 446 U.S. 398 (1980). "It is an ancient rule of statutory construction that penal statutes should be strictly construed against the government . . . and in favor of the persons on whom penalties are sought to be imposed." SUTHERLAND STATUTORY CONSTRUCTION § 59.03 (5th Ed).

> this definition implies that before one entrusted with or in lawful possession of a document is criminally liable for his conduct under the removal portion of section 793(f)(1), a third party must be the remover of the document. (Emphasis added)

Id.

Although the court focused on "permit" as the ambiguous term which made resort to the dictionary necessary, it appears in context that it construed the word by applying its dictionary definition against the subject it described, i.e., the phrase: "the same to be removed . . . ." This was logically correct. Since "permit" describes six enumerated dispositions -- removal, delivery to unauthorized persons, loss, theft, abstraction, and destruction -- which the custodian is charged with preventing, whether another actor is necessary depends on which disposition occurred rather than on the intrinsic meaning of "permit." For example, permitting the theft of the material clearly requires a third party, while permitting the loss of the same material does not. *Cf. Gonzalez*, 16 M.J. at 428.

This was also correct as a matter of statutory construction, since *reddendo singula singulis*.[4] "Permit," as the antecedent term, simply cannot be understood without reference to whichever of the six consequent terms -- i.e. removal, delivery, etc. -- it is applied to in a given case. *See generally*, SUTHERLAND STATUTORY CONSTRUCTION § 47.26 (5th Ed).

The Navy-Marine Corps Court of Military Review was therefore correct in *Chattin* where it held that a custodian can only be held liable under the removal portion of § 793(f)(1) where, through his gross negligence, he permits removal of classified material by another. This is so because -- whatever the definition of "permit" standing alone -- the phrase "permitting removal" suggests, in normal parlance, the presence of another.

In Petitioner's case, the Navy-Marine Corps Court, sitting *en banc*, impugned its reasoning in *Chattin* as involving "a fairly strained interpretation of the word 'permit' and [one] using a

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[4]"By referring each to each; referring each phrase or expression to the appropriate object. A rule of construction." BLACK'S LAW DICTIONARY 1277 (6th ed. 1990).

dictionary definition" and specifically declined to follow its earlier "faulty" analysis. *Roller*, 37 M.J. at 1095. The court then -- turning once more to the dictionary -- noted that "the definition of the word 'permit' includes 'to allow' or 'to let,' concepts that can refer to oneself." *Id.*

The court reasoned further that "permits" as used in § 793(f)(1) refers to material "lost, stolen, abstracted, or destroyed" as well as to material that is removed. Noting that neither legislative hearings nor the Court of Military Appeals' *Gonzalez* decision required the presence of a third party in cases of lost material, the court apparently syllogized that: 1) material can be *lost* without a third party present; 2) § 793(f)(1) addresses improper *removal*, *loss*, theft etc. in a single subsection; 3) the word "permit" describes the custodian's role in the *removal*, *loss*, theft, etc. of the material; 4) therefore, "permitting *removal*" does not require removal by a third party.

This analysis is flawed in several respects. It cites the opinion in *Gonzalez* as authority for an expansive construction of the word "permit,"[5] even though *Gonzalez* construed the meaning of the word "lost" and nothing more. The opinion did not directly address the import of the word "permit." That the conviction of a custodian whose gross negligence resulted in *his* losing classified materials -- without the intervention of another -- was upheld hardly means that the word "permit" reflects a legislative intent to hold custodians liable for each proscribed disposition regardless of whether another actor was involved. Were that the case, the statute would also proscribe a custodian's theft of materials through gross negligence. The logical absurdity and legal impossibility of such a construction underscores the infirmity of the lower court's reasoning on this point.

Indeed, it seems apparent that -- assuming that *Gonzalez* is at all instructive on the meaning of "permit" -- the ruling reflects only that it is not unusual in common parlance to say that someone "permitted something to be lost through gross negligence." Petitioner submits, however, that it is hardly common vernacular

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[5]"In interpreting this legislation, the Court of Military Appeals has adopted a definition of 'loss' that does not involve a third party." *Id.* at 1096.

to say that someone "permitted himself to remove something through gross negligence."

The Navy-Marine Corps Court reasoned further that "[i]t would seem anomalous to hold that the word 'permits' has two different meanings in the same section of a criminal provision, one meaning to be employed when proving classified information has been improperly removed . . . and another meaning used when such material is 'lost, stolen, abstracted, or destroyed.' We decline to so hold." *Roller*, 37 M.J. at 1096. Though it might ordinarily be somewhat anomalous to give one word several different meanings in a single statute, that is precisely what must be done where a single word is the antecedent for a list of consequent words, particularly where those words describe qualitatively different factual situations. Indeed, to not do so would require construction of the statute in a way which reduces portions of it to legal nonsense -- as demonstrated by the example above. That example -- concerning theft of the material -- aptly demonstrates that the meaning of the word does in fact hinge on which prohibited disposition is at issue.

It is also apparent from the quoted language that the Navy-Marine Corps Court reversed its ruling in *Chattin* based solely on the dictionary definition of the word "permits," viewed in a vacuum and without reference to the consequent terms it describes. By doing so, it construed the applicable subsection of the Federal Espionage Act in a manner which defies common idiom, construes ambiguity in a criminal statute in favor of the government, and fails to comply with the legal preference for general usage and common-meaning interpretation of ambiguous terms.

The United States Court of Appeals for the Armed Forces affirmed the decision of the Navy-Marine Corps Court of Military Review. They stated that while there are some instances where "permits" necessitates a third party, and some where it does not, that question is irrelevant. They held that:

> [t]he purpose of the federal espionage statute is to protect classified documents from any unauthorized procedures such as "remov[al] from its proper place of custody" regardless of the means of removal, and it was [petitioner]'s gross negligence that was the proximate cause of the

> classified document's removal. . . if involvement of a third party was the sole definition intended, the statute would have read "permits another to remove." Additionally, if lawful custodians were not intended for inclusion under this statute, the anomalous result would be that any unauthorized removal by them of classified documents from their proper place of custody would not be unlawful, whereas removal by another would be. This is not rational.

Roller, 42 M.J. at 266.

The Court of Appeals' ruling ignores the basic principles of statutory construction, that is, that the language of the statute determines its breadth. The lower court prefers to engage in mind-reading the intent of Congress. While one cannot argue with the role of an espionage statute in protecting national security, that necessity does not relieve Congress of its responsibility of drafting laws which clearly establish the prescribed bounds of behavior, nor does it relieve the courts of their responsibility to protect the individual from poorly drafted statutes. Merely harming national security does not make an act unlawful. The act must be specifically included in the criminal proscription. Congress may have desired to prohibit Petitioner's negligent behavior in the manner portrayed by the court below, but it did not do so the language of 18 U.S.C. § 793(f). They drafted a statute intended to prohibit spying, and which prohibits spies from benefitting from the gross negligence of a classified materials' custodian. They did not prescribe the negligent conduct engaged in by Petitioner, whereby he negligently removed classified documents himself. One cannot "permit" oneself to remove something. The lower courts erred. This Honorable Court must correct that error.

CONCLUSION

Petitioner's case presents an important question of construction of the Federal Espionage Act, the ramifications of which apply beyond the military context of this case. Interpretation of this significant question regarding a federal statute applicable to all should be resolved, not by a military court, but by the United States Supreme Court. Because it is a case of first impression in the non-military federal courts, this case is particularly worthy of this Court's discretionary review. Accordingly, this Court should issue a writ of certiorari.

Respectfully submitted,

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November 1995

APPENDICES

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 93-1553

NMCM 92 0437

UNITED STATES, *Appellee,*

v.

RICKIE L. ROLLER, *Appellant,*

Argued Dec. 14, 1994

Decided Aug. 23, 1995

For appellant: *Major Hagen W. Frank*, USMC (argued).

For appellee: *Lieutenant Commander David B. Auclair*, JAGC, USN (argued); *Colonel T.G. Hess*, USMC, and *Commander S. A. Stallings*, JAGC, USN (on brief); *Colonel J. Composto*, USMC.

Opinion of the Court

COX, Judge:

1. Pursuant to his pleas, appellant was found guilty of violating OPNAV INST 5510.1H[1] "by failing to ensure that unauthorized persons did not gain access to classified material in his possession," and violating 18 USC § 793(f)(1) through "gross negligence [by]

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[1] Department of the Navy, Chief of Naval Operations Instruction (OPNAV INST) 5510.1H.

removv[ing] ... classified documents and material relating to the National Defense ... from its proper place of custody and allow[ing] the material to be lost or delivered to another," in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 USC §§ 892 and 934, respectively. The military judge sentenced appellant to a dishonorable discharge, confinement for three years, forfeiture of $400.00 pay per month for 36 months, and reduction to the lowest enlisted grade. The convening authority approved the sentence as adjudged and, except for the discharge, ordered it executed; however, he suspended execution of confinement in excess of 10 months for a period of one year from the date of trial. The Court of Military Review[2] approved the findings and the sentence. 37 M.J. 1093 (1993).

2. On February 1, 1994, this Court granted review of the following issue:[3]

> WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW ERRED WHERE IT INTERPRETED THAT PART OF 18 USC § 793 (f)(1) WHICH PROHIBITS A CLASSIFIED MATERIAL CUSTODIAN FROM "PERMITTING" REMOVAL OF SUCH MATERIAL FROM ITS PROPER PLACE AS NOT REQUIRING REMOVAL BY A PERSON OTHER THAN SUCH CUSTODIAN.

We hold that there was no error.

I

3. Appellant was responsible for all the "code word" and other classified material coming into the Intelligence Division at Headquarters, United States Marine Corps, Washington, DC. It

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[2] *See* 41 M.J. 213, 229 n.* (1994).

[3] *See* 41 M.J. 340 n.1 (1995), for resolution of the other granted issue (39 M.J. 385).

was not unusual for him to place certain materials in his desk. Over the course of several months, classified documents were placed there by him. At some point, appellant's supervisor charged that he was disrespectful to his officer-in-charge and was derelict in the performance of his duties. These charges were later dismissed. Due to this conflict with his supervisor, appellant requested a transfer, and, on his last day, he hastily packed his gym bag with the personal effects from his desk. Unfortunately for appellant, in his haste he inadvertently took along with his personal papers the classified documents that had been placed in his desk. Several weeks later, appellant discovered his error, but fearing punishment if he now returned them, he decided to keep the documents stored in a drawer in his garage. His plan was to destroy the documents once he reached his new duty station.

4. While unpacking appellant's belongings, a moving company employee discovered the documents, and the Naval Investigative Service (NIS) was contacted. A search of appellant's household goods uncovered more classified documents, leading to the charges and conviction. These events occurred between February 28, 1989, and June 29, 1990.

See 37 M.J. at 1094-95.

II

5. Appellant argues that the wording of the Federal Espionage statute under which he was charged, by using the term "permits," necessarily implies the involvement of a third party. The statute reads in relevant part:

> Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) through gross negligence **permits** the same to be removed from its proper place of custody or delivered to anyone

> in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same had been illegally removed from its proper place of custody or delivered to anyone in violation of its trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer--
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 USC § 793(f) (emphasis added).

6. Much time has been devoted to the debate of whether permitting removal of classified documents requires the involvement of a third party. We conclude and hold that it does not. *Black's Law Dictionary* 1026 (5th ed. 1979) defines "permit" as "mean[ing] '[t]o suffer, allow, consent, let; to give leave or license; to acquiesce, by failing to prevent, or to expressly assent or agree to the doing of an act.'"[4] *See United States v. Chattin*, 33 M.J. 802, 804 (N.M.C.M.R. 1991). We have held that absent indications to the contrary, we will presume ordinary definitions suffice. *United States v. Gonzalez*, 16 M.J. 428, 429 (1983). The Court of Military Review decided in *United States v. Chattin*, 33 M.J. at 804, that the normal usage of the term did require a third party, but later reversed this opinion in its *en banc* decision in this case.[5] 37 M.J. at 1095-96.

7. Today we conclude this debate is too narrowly focused. There are instances where "permits" will necessitate the involvement of

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[4] *See* Black's Law Dictionary 1140 (6th ed. 1990).

[5] Since Roller's illegal activities occurred before *United States v. Chattin*, 33 M.J. 802, 804 (N.M.C.M.R. 1991), was decided, there is no need to consider if the principle "that where a [court] narrows an unconstitutionally overbroad statute, the [judiciary] must ensure that defendants are convicted under the statute as it is subsequently construed and not as it was originally written," *see Osborne v. Ohio*, 495 U.S. 103, 118 (1990), applies.

a third party and some where it will not, but here, whether another person is involved in the act is irrelevant. *See United States v. Gonzales*, 16 M.J. at 430. The purpose of the federal espionage statute is to protect classified documents from any unauthorized procedures such as "remov[al] from its proper place of custody" regardless of the means of removal, and it was appellant's gross negligence that was the proximate cause of the classified document's removal. We stated in *United States v. McGuinness*, 35 M.J. 149, 153 (1992), *cert. denied*, 113 S.Ct. 1364 (1993), that "it is clear that Congress intended to create a hierarchy of offenses against national security, ranging from 'classic spying' to merely losing classified materials through gross negligence."

8. The *Chattin* court concluded that it was illogical that Congress intended anything other than a third person. 33 M.J. at 804. We conclude that if involvement of a third party was the sole definition intended, the statute would have read "permits another to remove."[6] Additionally, if lawful custodians were not intended

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[6] 18 USC § 793(e) reads:

> Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same **to any person** not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; ...
>
> • • •
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(Emphasis added.)

for inclusion under this statute, the anomalous result would be that any unauthorized removal by them of classified documents from their proper place of custody would be unlawful, whereas removal by another would be. This is not rational.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges CRAWFORD, GIERKE, and WISS concur.

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 Stovall Street
Alexandria, VA 22332-2400

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

EN BANC

UNITED STATES

v.

RICKIE L. ROLLER, 545 02 5888
Sergeant (E-5), U.S. Marine Corps

NMCM 92 00437 PUBLISH
Decided 30 July 1993

Sentence adjudged 18 September 1991. Military Judge: E.W. Welch. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Pendleton, CA 92055-5000.

CAPT DWIGHT H. SULLIVAN, USMC, Appellate Defense Counsel

CAPT BRETT D. BARKEY, USMCR, Appellate Government Counsel

REED, Judge:

We have examined the record of trial, the assignments of error,[1]

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[1] I. THE FINDING OF GUILTY TO THE 18 U.S.C. § 703(F) VIOLATION IS INCONSISTENT WITH THIS COURT'S OPINION IN *UNITED STATES V. CHATTIN*.

A. Appellant Cannot Be Found Guilty of Permitting the Material to Be Removed Because He Removed the Materials from the SCIF Himself.

B. Appellant Was Not an Authorized Possessor of the Information at the Time it Was Obtained By An Unauthorized Individual.

C. The Staff Judge Advocate Erred by Advising the Convening Authority That *Chattin* Is Distinguishable.

D. The Providence Inquiry Is Insufficient to Support a Finding that Appellant Delivered the Classified Material to an Unauthorized Recipient Because this Information Was Contained Only in a Stipulation of Fact.

E. The *Felty* Doctrine Does Not Authorize Affirmance of the Finding of Guilty to Charge III, Specification 1.

II. THE RECORD MUST BE RETURNED FOR A NEW CONVENING AUTHORITY'S ACTION BECAUSE THE RECORD OF TRIAL DOES NOT CONTAIN A LETTER IN WHICH THE TRIAL DEFENSE COUNSEL RAISED LEGAL ERROR.

III. ¶ 60c(5)(a) OF THE 1984 MANUAL, A BINDING PROVISION ADOPTED BY THE PRESIDENT PURSUANT TO HIS POWERS UNDER ARTICLE 36, PRECLUDES CHARGING A SERVICE MEMBER UNDER ARTICLE 134 IF THE SAME MISCONDUCT CAN BE CHARGED AS AN ARTICLE 92 VIOLATION. (CITATION OMITTED.)

IV. APPELLANT'S COURT-MARTIAL LACKED JURISDICTION BECAUSE THE MILITARY JUDGE WAS DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION. BECAUSE THIS ERROR IS JURISDICTIONAL, THE ISSUE IS NOT

and the Government's reply thereto. We conclude that the assignments of error are without merit. Only the first assignment of error,[2] which deals with this Court's previous interpretation of 18 U.S.C. § 793(f), merits discussion.[3] Citing our opinion in *United States v. Chattin*, 33 M.J. 802 (N.M.C.M.R. 1991), *aff'd*, 36 M.J. 374 (C.M.A. 1992)(citing *United States v. McGuinness*, 35 M.J. 149 (C.M.A. 1992)), appellant argues he cannot be found guilty of "permitting" the classified information to be removed from its place of storage, and thus violating that statutory section, because he removed the materials himself. We disagree. To the extent that our decision conflicts with *Chattin*, we specifically decline to follow it. Our discussion follows.

Appellant was tried by general court-martial, military judge alone, on 11 and 18 September 1991. In accordance with his pleas, he was convicted of one specification of violating a general order[4] and one specification of violating the federal espionage

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WAIVED EVEN THOUGH IT WAS NOT RAISED AT TRIAL. (CITATION OMITTED.)

[2] Appellant alleges in assignment of error I.D that the providence inquiry is insufficient to support a finding that he delivered classified material to an unauthorized recipient because this information was contained only in a stipulation of fact. We note, however, that the military judge conducted an extensive inquiry of the factual basis for the offenses with appellant. The providence inquiry, supplemented by the stipulation of fact, established appellant's guilt to Charge III, Specification 1. *See United States v. Wimberly*, 20 C.M.A. 50, 42 C.M.R. 242 (1970); *United States v. Sawinski*, 16 M.J. 808 (N.M.C.M.R. 1983); *United States v. Testori*, 35 M.J. 745 (N.M.C.M.R. 1992).

[3] Based on affidavits submitted we conclude that the second assignment of error is without merit. Likewise, we consider the third assignment, *see United States v. McGuinness*, 35 M.J. 149 (C.M.A. 1992), the fourth assignment, *see United States v. Weiss*, 35 M.J. 224 (C.M.A. 1992) *cert. granted*, 61 U.S.L.W. 3787 (U.S. May 24, 1993)(No. 92-1482), and the fifth assignment, *see United States v. Graf*, 35 M.J. 450 (C.M.A. 1992), to be without merit.

[4] In that Sergeant Rickie L. Roller, U.S. Marine Corps, H&S Company, 1st Bn, 4th Marines, while on active duty, did, at Headquarters Marine Corps, Washington, D.C., and the surrounding community, during the period from on or about 28 February 1989 until on or about 29 June 1990, violate a lawful general

statue, 18 U.S.C. § 793(f),[5] in violation of the Uniform Code of Military Justice, Articles 92 and 134, 10 U.S.C. §§ 892 and 934, respectively. He was sentenced to three years' confinement, reduction to E-1, forfeiture of $400.00 pay per month for 36 months and a dishonorable discharge. The convening authority approved the sentence, but suspended for one year all confinement in excess of ten months.

BACKGROUND

Appellant was responsible for all the "code word" and other classified material coming into the Intelligence Division at Headquarters, U.S. Marine Corps, Washington, D.C. Over the course of several months, he placed classified materials in his desk, which was located in an authorized secured area (SCIF).[6] Due to a conflict with his supervisor, appellant requested a transfer, which was approved. Prior to appellant's detachment, his supervisor preferred charges against him. These charges were dismissed the day before appellant checked out. On his last day at work, appellant hastily packed his gym bag with material from his desk and left the SCIF. Unfortunately for appellant, classified materials were included within the items he removed. He had no authority to remove the classified materials.

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order, to wit: paragraph 13-2 1., OPNAV Instruction 5510.1H dated 29 April 1988, by failing to ensure that unauthorized persons did not gain access to classified material in his possession.

[5] In that Sergeant Rickie L. Roller, U.S. Marine Corps, H&S Company, 1st Bn, 4th Marines, while on active duty, did, at Headquarters Marine Corps, Washington, D.C., and the surrounding community, during the period on or about 28 February 1989 until on or about 20 September 1990, violate 18 USC Sect 793(f), by having been entrusted with possession of classified documents and material relating to the National Defense, by gross negligence removed that material from its proper place of custody and allowed the material to be lost or delivered to another in violation of his trust.

[6] A "SCIF" is a sensitive compartmented information facility.

At his home several weeks later, appellant discovered the classified material. Afraid that he might get in trouble if he now returned this material, he kept it and stored it in a drawer in his garage. He indicated he intended to destroy the material when he got to his new duty station. Before that could occur, a moving company employee discovered some of the material as he unpacked appellant's household goods at his new duty station at Oceanside, California. This employee subsequently consulted a bail bondsman to whom he owed money to inquire what should be done with this classified material. As a result of that inquiry, the Naval Investigative Service (NIS) was notified and an investigation commenced. NIS recovered additional classified documents as the result of a search of appellant's household goods. These materials were marked, variously, "NOFORN," "Secret," and "Top Secret," and some were additionally marked as containing compartmented information.

DISCUSSION

Title 18, U.S. Code, § 793(f) provides that:

> Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, ... Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This Court held in *Chattin* that for a servicemember to be successfully prosecuted under 18 U.S.C.
§ 793(f)(1) for "permitting" classified materials to be removed from their proper place, a third party had to remove the material; a member could not be convicted for removing the materials

himself. Having reviewed *Chattin* we conclude that our analysis therein was faulty.

In *Chattin* we noted that

> The statutory language of section 793(f)(1) contains the term 'permit' as the active ingredient for the gross negligence condemned. That statute, however, does not define 'permit.' ... Although the statutory language of section 793(f)(1) should be given broad interpretation, such an interpretation must be logical and consistent with the conduct Congress intended the statute to prohibit.

33 M.J. at 804 (footnote and citations omitted). Then through a fairly strained interpretation of the word "permit" and using a dictionary definition, we concluded that a third party must be involved before a violation could occur. We now believe that interpretation to be wrong. The definition of the word "permit" includes "to allow" or "to let," concepts that can refer to oneself. *Black's Law Dictionary* 1026 (5th ed. 1979).

In 18 U.S.C. § 793(f), "permits" refers not only to material improperly "removed from its proper place of custody" but also, to material "lost, stolen, abstracted, or destroyed." As we noted in *Chattin*, the legislative history contains little assistance in interpreting § 793(f). The House hearing on the original version of this section[7] makes clear that, in so far as the "loss" of

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[7] Sec. 3. Whoever, having possession of, access to, control over, or being intrusted with any information, document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan model, instrument, appliance, or note, belonging to, intended for, or under the control of the United States, relating to the national defense, willfully and without proper authority communicates or transmits or attempts to communicate or transmit the same to any person, or willfully retains the same and fails to deliver it on demand to the person lawfully entitled to receive it, or through gross negligence permits the same to be removed

classified information is concerned, no third party involvement is required. *See* "Congressional Record-House", 1917, pp. 1759-1762. In interpreting this legislation, the Court of Military Appeals has adopted a definition of "loss" that does not involve a third party. *See United States v. Gonzales*, 16 M.J. 428 (C.M.A. 1983).[8]

Considering the Act *in pari materia*, we note that

> Sections 793(a) and 794(a) require that the act be done, "with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation." Sections 793(d) and (e), however, require only that the accused act "willfully." ... Section 793(f) has an even lower threshold, punishing loss of classified materials through "gross negligence" and punishing to promptly report a loss of classified materials.

McGuinness, 35 M.J. at 153.

It would seem anomalous to hold that the word "permits" has two different meanings in the same section of a criminal provision, one meaning to be employed when proving classified information has been improperly removed from its place of custody and another meaning used when such material is "lost, stolen, abstracted, or destroyed." We decline to so hold. "[I]t is clear that

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> from its proper place of custody, or delivered to anyone not lawfully entitled to receive it, or to be lost, stolen, abstracted, or destroyed, shall upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both.

[8] "An article is 'lost' when the owner has lost the possession or custody of it, involuntarily and by any means, but more particularly by accident or his own negligence or forgetfulness, *and when he is ignorant of its whereabouts* or cannot recover it by an ordinarily diligent search." *Gonzales*, 16 M.J. at 430 (emphasis to Black's definition supplied by C.M.A.)

Congress intended to create a hierarchy of offenses against national security, ranging from "classic spying" to merely losing classified materials through gross negligence." *McGuinness*, 35 M.J. at 153. Therefore a violation of 18 U.S.C. § 793(f) does not require the involvement of a third party.

In *Chattin* we also held that because the facts showed appellant was an unauthorized possessor of the document, there was no factual basis to support the first element of section 793(f)(1) requiring the offender to be a lawful possessor or one who had been entrusted with the document. *Chattin*, 33 M.J. at 804. *Chattin*, however, involved the intentional theft of classified documents by one into whose custody the Government had entrusted the classified material. In the case before us, appellant, through his gross negligence, took classified material with him during his transfer to a new duty station. Like Judge Lawrence in his dissent in *Chattin*, we believe that

> prosecution under section 793(f)(1) is [not] precluded of a person who, being entrusted with an enumerated item or information relating to the national defense, in some way violates the terms of his entrustment: violation of the terms of this kind of entrustment does not terminate the entrustment. The terms of any entrustment of national defense information necessarily include a requirement of due "care, use or disposal of it," *see Black's Law Dictionary* 478 (5th ed. 1979); thus, if the majority's interpretation were accepted, many, if not all, acts of gross negligence that constituted a violation of section 793(f)(1) would terminate the entrustment and preclude prosecution under the section.

Chattin, 33 M.J. at 809 (Lawrence, J., dissenting). Once appellant discovered he had inadvertently taken classified information with him, albeit through his own gross negligence, he nevertheless had a continuing duty to safeguard the information until such time as he had an opportunity to return it to the Government's care. While

not authorized to have such material with him outside a secure area, appellant was nevertheless entrusted with its care once he discovered it in his possession. *Cf. Gonzalez, supra.* "Anyone who has possession of classified material is responsible for safeguarding it at all times . . . ." Chief of Naval Operations Instruction 5510.1H of 29 April 1988, Subj: Department of the Navy Information and Personnel Security Program Regulation, ¶ 13-1. Appellant's negligence in failing to safeguard the material once discovered resulted in its loss since it was shortly discovered and taken away by unauthorized third parties. Appellant could be and was prosecuted for such loss.[9]

The findings and sentence, as approved on review below, are affirmed.

ALBERT A. REED

Chief Judge LARSON, Senior Judge FREYER, ORR, STRICKLAND, and Judge MOLLISON concur.

Lawrence, Judge, concurring in the result:

In *Chattin*, I dissented to the majority's holding that under 18 U.S.C. § 793(f) violation of the terms of an entrustment of national defense material effectively terminates the entrustment, making the possession unauthorized and therefore outside the scope of the section. That holding is not mandated by the plain language of the provision and is contrary to the legislative intent behind it. I join in overruling this portion of *Chattin.*

I disagree with the majority in this case in overruling that portion of *Chattin* that interpreted the word "permits" in 18 U.S.C. § 793(f)(1) and concluded that a third party must be involved to

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[9] We have no need to discuss the possible duplicitous nature of Specification 1 of Charge III since any such error only inures to the benefit of appellant.

support a conviction under that section. To me, we need not reach that question. Due to appellant's gross negligence, a moving company employee discovered highly classified national defense information in appellant's household goods shipment. That employee then consulted a bail bondsman and asked what should be done with the materials. Fortunately, the bondsman apparently gave the correct advice and an investigation was begun. Nonetheless, the discovery of this national defense information by the moving company employee constituted a loss of that material under 18 U.S.C. § 793(f)(1). *United States v. Gonzalez*, 16 M.J. 428 (C.M.A. 1983).

In this case, the loss of the national defense information was specifically alleged in the specification to which appellant pled guilty, accordingly, if the military judge was permitted to consider the facts listed above, there is a factual basis for the finding of guilty to the specification as alleged, although the words "removed the material from its proper place and" and the words "or delivered to another in violation of his trust" should be excepted from the specification prior to affirming the finding of guilty. Further if an accused pleads guilty and during the providence inquiry his responses establish a different but closely-related offense having a similar maximum punishment, the guilty plea may be affirmed on review. *United States v. Hubbard*, 28 M.J. 203, 206 (C.M.A. 1989); *United States v. Epps*, 25 M.J. 319, 323 (C.M.A. 1987); *United States v. Felty*, 12 M.J. 438 (C.M.A. 1982). Certainly, the general reasoning behind *Felty* would amply support affirmance of a finding of guilty to violating 18 U.S.C. § 793(f)(1) under these circumstances.

Information concerning the loss was not elicited from appellant orally on the record, rather it is contained in Appellate Exhibit III, a stipulation of fact admitted during the providence inquiry. Appellant now contends that because the military judge did not specifically inquire of appellant on the record to elicit those facts from appellant's mouth, the military judge could not consider them in determining whether the guilty pleas have a factual basis. Likewise, appellant contends that we may not consider them either

in establishing facts that permit us to uphold the guilty plea to violation of the espionage statute.

I disagree. Appellant signed the stipulation declaring that he expressly consented to enter into it and that the facts contained in the stipulation are true. On the record, appellant stated that (1) his signature appeared on the last page of the document, (2) he had read the stipulation carefully and had discussed it with his counsel before he signed it, (3) he understood the stipulation, (4) the facts contained in the stipulation are true, and (5) he consented to the military judge's use of the stipulation at trial. Thereafter, the military judge read the stipulation during a brief recess. That portion of the stipulation relating to the discovery of the national defense information is written in plain language, is unambiguous, and is entirely consistent with appellant's guilty pleas. In my opinion, given these facts, the military judge properly could consider the stipulated facts in determining whether the guilty pleas were provident just as we may in deciding if there is a factual basis for the guilty pleas and findings.

Because the stipulated facts establish the loss of this sensitive material, we need not address the correctness of that portion of *Chattin* that requires a third party for conviction under this section of the espionage statute. At a minimum, the doctrine of stare decisis strongly discourages overruling a prior decision involving statutory interpretation when another ground for decision is readily available to the deciding court. This principle applies even when the court sits en banc and the prior decision is one of a panel of the court. Thus, to me, the majority in the case needlessly and inappropriately overrules a previous decision of this Court. This portion of *Chattin* should not be reexamined until we have a case for decision that involves facts and issues that require us to decide whether a third person must be involved to support a conviction under 18 U.S.C. § 793(f)(1).

T.A. LAWRENCE

Senior Judges JONES and WELCH did no participate.

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